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No. 75-1587

In the Supreme Court of the United States

OCTOBER TERM, 1975

KENNETH L. SNOW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that the trial court erred in admitting evidence of his failure to file federal income tax returns for the years 1961 through 1967 in his prosecution for filing false returns for the years 1968 through 1970.

After a jury trial, petitioner was convicted in the United States District Court for the Southern District of California on three counts of having willfully filed false income tax returns for the years 1968 through 1970, in violation of 26 U.S.C. 7206(1).[1] He was sentenced to a term of one year and one day on the first count. The court imposed concurrent terms of three years' probation on the remaining two counts, to commence after the expiration of the prison term

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[1]Petitioner was also convicted of one count of having willfully failed to file an income tax return for 1971, in violation of 26 U.S.C. 7203, but the district court later set aside the conviction on this count (Pet. App. A, p. 2).

on the first count. The court of appeals affirmed (Pet. App. A, pp. 1-8).

At trial, it was stipulated that petitioner's income tax returns for 1968 through 1970 were false because they omitted "subcontracting income" which petitioner had received from the Jack Files Construction Company (R.T. 18-19, 180-183).[2] It was also shown that petitioner's tax returns were false because he overstated the number of exemptions to which he was entitled (R.T. 18-19, 21-32, 35, 39; Govt. Ex. 7).

As part of its proof on the issue of willfulness, the government established that petitioner had not filed tax returns for the years 1961 through 1967 (R.T. 152-154; Govt. Exs. 16, 17). The jury was instructed that this evidence was offered solely on the issue of petitioner's intent (Pet. App. A, p. 5; R.S.T. 4, 9, 15-16, 26).[3] In his testimony, petitioner admitted that although he had earned over $600 in

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[2]"R.T." refers to the reporter's transcript of proceedings at the trial. "R.S.T." refers to the reporter's supplemental transcript. "Govt. Ex." references are to exhibits introduced by the government at trial.

[3]The trial court charged the jury as follows (R.S.T. 15-16, 26):

> Evidence that an act was done at one time or on one occasion is not any evidence or proof whatever that a similar act was done at another time or on another occasion; that is to say, evidence that a defendant may have committed an earlier act of a like nature may not be considered by the jury in determining whether the accused committed any act charged in the indictment.
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> Nor may evidence of an alleged earlier act of a like nature be considered for any other purpose whatever, unless the jury first finds that the other evidence in the case standing alone establishes beyond a reasonable doubt that the accused did the particular act charged in the particular count of the indictment then under deliberation. If the jury should find beyond a reasonable doubt from other evidence in the case that the accused did the act charged in the particular count under deliberation, then the jury may consider evidence as to an alleged earlier act of a like nature in determining the state of mind or intent with which the accused did the act charged in the particular count. And where proof of an alleged earlier act of a like nature is established by evidence which is clear and conclusive, the jury may, but not obligated to, draw the inference and find that, in doing the act charged in the particular count under deliberation, the accused acted willfully and with specific intent, and not because of mistake or accident or other innocent reason.
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> * * * * *
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> You are instructed that, although the defendant is in this indictment charged only with criminal income tax violations for the calendar years 1968 through 1971, the court permitted the Government to introduce evidence that no return was filed for the years 1962 through 1967. Such evidence is to be considered by you only insofar as you may find that it bears or relates to the intent of the defendant for the years involved in the indictment. In other words, such evidence can only be considered by you for the limited purpose of throwing light upon the state of mind and intent of the defendant during the years charged in the indictment.

each of the years 1962 through 1967, he had not filed federal income tax returns for those years (R.T. 402-403, 419).

1. Although petitioner concedes (Pet. 9-10) that prior acts similar to the offense charged are admissible on the issue of intent, he argues (Pet. 10-12) that a failure to file a tax return is not similar to the act of filing a false tax return. But the failure to file a required tax return and the filing of a false tax return both evidence a disregard of the same duty imposed by the tax laws, *viz.*, the duty to report honestly and completely as to income, deductions, exemptions, and the like. Thus, as the decision below correctly observed (Pet. App. A, pp. 7-8), the courts of appeals have held that evidence of the defendant's attitude toward honest reporting of income and deductions, either prior or subsequent to the acts charged, may be admitted with proper limiting instructions to the jury. See, *e.g.*, *Emmich* v. *United States*, 298 Fed. 5 (C.A. 6), certiorari denied, 266 U.S. 608 (evidence of prior failure to file return admissible in trial for filing a false return); *Harris* v. *United*

States, 243 F.2d 74 (C.A. 5), certiorari denied, 355 U.S. 817 (same); *United States* v. *Taylor*, 305 F.2d 183, 185-186 (C.A. 4), certiorari denied, 371 U.S. 894 (evidence of prior failure to file and underpayment of state income taxes admissible in trial for filing false returns); *United States* v. *Magnus*, 365 F.2d 1007, 1011 (C.A. 2), certiorari denied, 386 U.S. 909 (evidence of prior failure to file admissible in trial for tax evasion); *United States* v. *O'Connor*, 433 F.2d 752, 754-755 (C.A. 1), certiorari denied, 401 U.S. 911 (evidence of defendant's delinquent payments and statement in his political flier that he had paid tax admissible to prove willfulness in trial for failure to file). Accord: *Amos* v. *United States*, 496 F.2d 1269, 1273-1274 (C.A. 8), certiorari denied, 419 U.S. 896.

2. Petitioner argues (Pet. 2, 11) that the decision below conflicts with *United States* v. *Long*, 257 F.2d 340 (C.A. 3).[4] There, the court held that evidence that the defendant had failed to file a return in 1948 was inadmissible on the issue of his willfulness with respect to a tax evasion charge for the years 1949 through 1953. In so holding, the court emphasized that the defendant's failure to file was only for one year and was therefore different from the cases "which hold that repetition of the same course, whether failure to file or substantial understatement, over several years may justify an inference that this was intentional rather than inadvertent" (257 F.2d at 342). Thus the court in *Long* itself distinguished its decision from cases, such as this one, where there was evidence of repeated failures to file over an extended (in this instance seven-year) period.

The decision in *Long* stood in part on the Third Circuit's view that under *Spies* v. *United States*, 317 U.S. 492, "it is difficult to see how evidence concerning passive failure to perform a required act in 1948 can indicate willfulness in affirmative misdoing during the following year" (257 F.2d at 341). But nothing in *Spies* precludes the

introduction of such evidence as long as it is accompanied with proper limiting instructions. *Spies* only rejected the "contention that a willful failure to file a return, together with a willful failure to pay the tax, may, without more, constitute an attempt to defeat or evade a tax * * *" (317 U.S. at 494-495). Thus, *Spies* bars a felony conviction for tax evasion when the proof will only support the misdemeanors of failure to file a return and failure to pay the tax.

Here, however, the proof of petitioner's prior failure to file was admitted only for the purpose of showing willfulness and not as proof of the falsity of petitioner's return. Such falsity was separately proved by independent evidence. The court of appeals therefore properly refused to subscribe to this ground of the *Long* decision, noting (Pet. App. A, p. 7 n. 2) that it has been explicitly rejected by the First Circuit in *O'Connor*. Indeed, apart from the weight of subsequent appellate decisions to the contrary, recent decisions of the Third Circuit suggest that *Long* would no longer be followed by that court. See, *e.g.*, *United States* v. *Todaro*, 448 F.2d 64, 66-67 (C.A. 3), certiorari denied, 404 U.S. 1040; *United States* v. *Carter*, 401 F.2d 748, 749-750 (C.A. 3), certiorari denied, 393 U.S. 1103. See also *United States* v. *Stirone*, 262 F.2d 571, 576 (C.A. 3), reversed on other grounds, 361 U.S. 212.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1976.

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[4]Petitioner also asserts (Pet. 12-15) that there was no proof that he was required to file the returns which he did not file. But petitioner conceded at trial that he did not file income tax returns for the years 1962 through 1967 although he had earned over $600 in each of those years. See 26 U.S.C. 6012, as effective prior to December 31, 1971.